

1 HONORABLE RONALD B. LEIGHTON
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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA

10 J & J SPORTS PRODUCTIONS, INC.,

11 Plaintiff,

12 v.

13 Defendants.

CASE NO. C17-5324 RBL

ORDER ON MOTION TO DISMISS

14 THIS MATTER is before the Court on Defendants' Motion to Dismiss [Dkt. 42].

15 Plaintiff J&J Sports Productions owned the exclusive nationwide commercial distributions rights
16 to the May 2015 "Fight of the Century" between Floyd Mayweather, Jr. and Manny Pacquiao.
17 J&J claims that Defendant Tacoma FC Clubhouse violated its distribution rights by showing the
18 Pay-Per-View fight at an event at its clubhouse, which it claims is open to both Tacoma FC's
19 members and the general public. J&J claims that Defendant Smith bought the fight on his
20 residential account but instead showed it (or permitted it to be shown) "for financial benefit" at
21 the clubhouse. It sued Tacoma FC and Smith for damages under the Communications and the
22 Cable and Communications Policy Acts.

1 Tacoma FC and Smith seek dismissal. Tacoma FC argues that the Court does not have
2 subject matter jurisdiction over J&J's claim against it because Tacoma FC "does not exist." It
3 seeks to demonstrate that fact by submitting search results from the Washington Secretary of
4 State website purporting to show that Tacoma FC is not incorporated or licensed to do business.

5 J&J argues persuasively that an unincorporated association can be sued even if it is not
6 registered with the Secretary of State. It argues that Tacoma FC's existential argument does not
7 deprive this court of subject matter jurisdiction over a claim arising under federal law.

8 Undeterred, Tacoma FC argues that its very existence must be resolved as a factual
9 matter before the court can have subject matter jurisdiction. It also raises a more traditional
10 defense, arguing that it is not liable simply because the fight was shown at its clubhouse. Rather,
11 it claims, it can only be liable if it had the right and ability to police the programming at the
12 clubhouse, or if it profited from its display at the clubhouse.

13 Smith argues that J&J has failed to plead any facts plausibly tying him to Tacoma FC or
14 its display of the fight. It has at best "implicated" his residential account, but it has not plausibly
15 alleged that Smith had ownership or control over the clubhouse, or that he had any financial
16 interest in it. Smith argues he is not liable simply because his residential account was used to
17 purchase the fight.

18 J&J argues that Smith is strictly liable for the use of his residential purchase outside of
19 his dwelling. It asserts that Smith's concerns are "belied" by its allegation that the fight displayed
20 at the event was purchased on Smith's residential account by Smith. J&J argues that it has pled
21 that Smith had the "right and ability to supervise" Tacoma FC, that he had the "obligation to
22 supervise" Tacoma FC, that he "intercepted" or "specifically directed or permitted" Tacoma FC
23 to "unlawfully intercept" the program, and that the "unlawful broadcast ... resulted in direct or

1 indirect financial gains and benefits.” J&J argues that these allegations are specific and plausibly
2 establish Smith’s responsibility for the unlawful distribution.

3 Dismissal under Fed. R. Civ. P. 12(b)(6) may be based on either the lack of a cognizable
4 legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri*
5 v. *Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). A plaintiff’s complaint must allege
6 facts to state a claim for relief that is plausible on its face. *See Ashcroft v. Iqbal*, 556 U.S. 662,
7 678 (2009). A claim has “facial plausibility” when the party seeking relief “pleads factual
8 content that allows the court to draw the reasonable inference that the defendant is liable for the
9 misconduct alleged.” *Id.*

10 Although the court must accept as true the Complaint’s well-pled facts, conclusory
11 allegations of law and unwarranted inferences will not defeat an otherwise proper 12(b)(6)
12 motion to dismiss. *Vazquez v. Los Angeles Cty.*, 487 F.3d 1246, 1249 (9th Cir. 2007); *Sprewell v.*
13 *Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). “[A] plaintiff’s obligation to provide
14 the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a
15 formulaic recitation of the elements of a cause of action will not do. Factual allegations must be
16 enough to raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550
17 U.S. 544, 555 (2007) (citations and footnotes omitted). This requires a plaintiff to plead “more
18 than an unadorned, the-defendant-unlawfully-harmed-me-accusation.” *Iqbal*, 556 U.S. at 678
19 (citing *id.*).

20 On a Rule 12(b)(6) motion, “a district court should grant leave to amend even if no
21 request to amend the pleading was made, unless it determines that the pleading could not
22 possibly be cured by the allegation of other facts.” *Cook, Perkiss & Liehe v. N. Cal. Collection*
23 *Serv.*, 911 F.2d 242, 247 (9th Cir. 1990). However, where the facts are not in dispute, and the
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1 sole issue is whether there is liability as a matter of substantive law, the court may deny leave to
2 amend. *Albrecht v. Lund*, 845 F.2d 193, 195–96 (9th Cir. 1988).

3 Dismissal under Fed. R. Civ. P. 12(b)(1) may be based on a facial or factual attack of a
4 district court's subject matter jurisdiction. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). A
5 factual attack challenges the truth of the plaintiff's factual allegations. *Leite v. Crane Co.*, 749
6 F.3d 1117, 1121 (9th Cir. 2014). In resolving a factual attack, the court may consider evidence
7 presented with respect to the jurisdictional issue and rule on that issue. *Thornhill Pub. Co., Inc. v.*
8 *Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). An attack on a federal-question
9 claim should not be granted unless the claim “clearly appears to be immaterial and made solely
10 for the purpose of obtaining federal jurisdiction or where such claim is wholly insubstantial and
11 frivolous.” *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).

12 The Communications Act and the Cable and Communications Policy Act prohibit the
13 unauthorized use of pay-per-view programming. *See* 47 U.S.C. §605(a)-(b); *see also* 47 U.S.C. §
14 553(a). One harmed by such violations can sue for money damages. 47 U.S.C. § 605 (e)(3)(A),
15 (e)(3)(B)(ii); 47 USC § 553 (c)(1), (c)(2)(B); *See* 47 U.S.C. § 605(d)(6).

16 **A. Tacoma FC**

17 Tacoma FC's claim that the Court does not have subject matter jurisdiction because it
18 “does not exist” is not supported by the cases it cites. The *Rice* court did not hold that parties
19 who call themselves improperly named are dismissed. *Rice v. Hamilton Air Force Base*
20 *Commissary*, 720 F.2d 1082, 1085 (9th Cir. 1983) (“It is undisputed that the improper defendant
21 was named at the top of Rice's timely filing. That, though, does not compel a finding that the
22 proper defendant was not, in fact, named.”). The *McCarthy* court did not hold that a court does
23 not have subject matter jurisdiction to hear a claim when a party asserts that it does not exist.
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1 *McCarthy v. United States*, 850 F.2d 558 (9th Cir. 1988) (conducted limited factual investigation
2 to determine whether the cause of action fell under the immunity provision of the Flood Control
3 Act.).

4 The Court has subject matter jurisdiction to hear the claim because the federal Acts upon
5 which the plaintiffs sued raise a federal question. Tacoma FC is a proper defendant for purposes
6 of the court's subject matter jurisdiction. Whether it violated the Acts and whether J&J can
7 enforce any resulting judgment are questions for another day. Tacoma FC's Motion to Dismiss is
8 **DENIED.**

9 **B. Smith**

10 J&J's broadly labels Smith as a "member, owner, and/or operator, and/or licensee, and/or
11 permittee, and/or persons in charge, and/or an individual with dominion, control, oversight and
12 management of Tacoma FC." It attempts to show that its commercial distribution rights were
13 violated by pleading that the interception was "for purposes of direct and/or indirect commercial
14 advantage and/or private financial gain."

15 J&J has simply parroted the elements of the statute without factual context. It has,
16 therefore, failed to plausibly state a claim. But the corrective for this is not dismissal, it is leave
17 to amend. Smith's Motion to Dismiss is **DENIED**. J&J shall file an amended complaint
18 addressing this deficiency within 21 days, or its claims against Smith will be dismissed.

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1 Smith's alternate request for a continuance (based on his recent arrival in the case) is
2 **GRANTED**. The Trial date is **STRICKEN** and the Clerk will issue a new scheduling Order. **IT**
3 **IS SO ORDERED.**

Dated this 12th day of October, 2018.

Ronald B. Lightner

Ronald B. Leighton
United States District Judge